

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUTH SAMUEL as the Personal )  
representative of the Estate, )  
of Nathan Samuel, deceased, )  
Plaintiff, )  
V. ) No. 10-CV-683-GKF-TLW  
CITY OF BROKEN ARROW, Oklahoma )  
a municipal corporation and )  
STEPHEN GARRETT, an individual, )  
Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON NOVEMBER 17, 2011

MOTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

For the Plaintiff: Mr. George M. Miles  
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(APPEARANCES CONTINUED)

For the Defendant      Mr. Scott B. Wood  
Stephen Garrett:      Wood Puhl & Wood  
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                                  -   -   -   -   -

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PROCEEDINGS

November 17, 2011

THE COURT: Be seated please.

THE CLERK: We're here in the matter of Ruth Samuel  
 vs. City Broken Arrow, et al., Case Number 10-CV-683-GKF. Will  
 the parties please enter their appearances.

MR. MILES: George Miles and Steven Hickman on behalf  
 of the plaintiff.

THE COURT: Good afternoon.

MR. WOOD: Scott Wood on behalf of the defendant  
 Stephen Garrett.

1 MS. WILKENING: Liz Anne Wilkening and Trevor Dennis  
2 on behalf of the City of Broken Arrow.

3 THE COURT: Good afternoon. Which motion have you-all  
4 decided we ought take up first?

5 MR. WOOD: Judge, we discussed that. I think it makes  
6 probably more sense for me to go first.

7 THE COURT: Very well. And just to let you know,  
8 because this case involves a death I think rather than rule  
9 from the bench here we need a written order so I'm not  
10 intending to issue a decision from the bench here today.

11 MR. WOOD: Very well. May it please the Court. Your  
12 Honor, on the evening of October 6, 2009, the plaintiff, Ruth  
13 Samuel, was in her home in Broken Arrow on East 36th Place when  
14 she went outside to smoke a cigarette on her driveway. Shortly  
15 after that her estranged husband, Nathan Samuel, arrived,  
16 parked his car in the driveway and they began a conversation.  
17 That conversation degenerated into an argument and Nathan  
18 Samuel became angry and started calling the plaintiff names,  
19 and then he finally pushed her to the ground and grabbed her by  
20 the neck and began choking her. Ruth Samuel cried out for help  
21 and her neighbor, Jimmy Franklin, heard her and came outside  
22 and when he saw what was happening he dialed 911. The 911  
23 operator in the City of Broken Arrow was told that "There's a  
24 guy beating up a woman." Franklin also reported that, "I don't  
25 think I should get involved because he's pretty mean." And

1 finally he told the dispatcher "I'm afraid she's going to get  
2 hurt."

3 The call was dispatched and Officer Kevin Hunsberger  
4 was assigned as the primary officer, Officer Garrett was  
5 assigned as his backer. However, Garrett was less than a mile  
6 away and he arrived in just a few minutes, ahead of Hunsberger,  
7 at the house in the 209 block of East 36th Place.

8 The following that I'm getting ready to outline took  
9 place in about 60 seconds. Officer Garrett pulled up and was  
10 looking for the house numbers on 36th Place when he shined the  
11 light on plaintiffs house and saw Nathan Samuel and the  
12 plaintiff standing at the top of the driveway near the garage.  
13 As Officer Garrett stopped his car and parked it and began to  
14 get out he observed Mr. Samuel make a beeline for the front  
15 door of the house. Mrs. Samuel had locked the door with a key  
16 before she had come out to smoke her cigarette and Mr. Samuel  
17 went right up to the door and kicked it open by putting his  
18 foot out in front and knocking the door open. He then entered  
19 into the house and Officer Garrett proceeded from his car  
20 across the front yard towards where Mrs. Samuel was near the  
21 driveway. She came out into the yard a few feet to visit with  
22 him and she told him, "Hey, everything's okay, we don't need  
23 you here." Officer Garrett about that time heard the distinct  
24 noise of a kitchen utensil drawer being opened and closed,  
25 prompting him to ask the question of Ms. Samuel, "Does he have

1 any weapons?" Officer Garrett reported that she replied either  
2 "He's getting a knife" or "He's got a knife." At that time  
3 Officer Garrett directed Ms. Samuel to get back away from that  
4 area and she moved back toward the driveway from where she had  
5 come.

6 In the meantime, Officer Garrett could see into the  
7 how soon the front door of the house was open after being  
8 kicked in and there was a hallway that led back to a living  
9 area and also if you go into the house and turned to the left  
10 there's a kitchen area. When he looked back down into the  
11 house he could see Nathan Samuel coming out of the kitchen  
12 walking towards the front door. He was holding something, but  
13 he couldn't tell what it was as yet. Mr. Samuel continued  
14 towards Officer Garrett who is now standing in the front yard  
15 almost directly in line with the front door and when Mr. Samuel  
16 crosses the threshold of the door, Officer Garrett can see that  
17 he's got a large knife in his hand. He estimated it to be  
18 between 8 and 12 inches. As it turns out from the physical  
19 evidence we know it was a 10-inch porterhouse steak knife. As  
20 Mr. Samuel crossed the threshold he raised his arms up with the  
21 knife in his right hand with the blade pointed towards Officer  
22 Garrett. He came across the threshold and stopped. Officer  
23 Garrett ordered him to put the knife down and then on his lapel  
24 microphone said to the dispatcher, "He's got a knife, speed it  
25 up," referring to getting help or getting a backer there more

1 quickly.

2           Officer Garrett had drawn his weapon when he had heard  
3 that he was getting a knife and almost simultaneously could  
4 hear the utensil door rattling, so he already had his gun out  
5 and in his hand. He was pointing it at Mr. Samuel when he  
6 ordered him to drop the knife. Instead of following that  
7 lawful command, Nathan Samuel took two more steps towards  
8 Officer Garrett, still holding the knife up near the top of his  
9 head with the blade pointed forward.

10           THE COURT: Okay. That's from threshold?

11           MR. WOOD: He had passed the threshold a step or two  
12 and then stopped.

13           THE COURT: All right. And then took two steps?

14           MR. WOOD: And then took two steps.

15           THE COURT: All right. Now, is this undisputed?

16           MR. WOOD: Yes, it is.

17           THE COURT: As to the two additional steps?

18           MR. WOOD: I believe it is undisputed, yes.

19           THE COURT: All right. And this is two more steps  
20 after ordered to drop the knife?

21           MR. WOOD: Correct. At that point Officer Garrett  
22 gave another command to drop the knife, but Mr. Samuel did not.  
23 He maintained his stance and his positioning with the knife  
24 blade towards Officer Garrett.

25           THE COURT: All right, now at this point is he still

1 on concrete or is he out into the yard?

2 MR. WOOD: He is still on the porch of the house, Your  
3 Honor.

4 THE COURT: After the two steps?

5 MR. WOOD: After the two steps he's still on the  
6 porch.

7 THE COURT: Okay.

8 MR. WOOD: Officer Garrett at this point, he's  
9 testified that it was his recollection that he was at the very  
10 end of the sidewalk that led out from the house, that makes an  
11 L turn and goes back over towards the driveway. There's a  
12 photograph of --

13 THE COURT: I've seen it.

14 MR. WOOD: -- of the layout.

15 THE COURT: But you're saying the officer is  
16 contending he's all the way out to the edge of the concrete  
17 next to the yard or is he still on the porch between...

18 MR. WOOD: He believes he was right here, Your Honor,  
19 at the end of the sidewalk that comes the straight out from the  
20 porch.

21 THE COURT: All right. That's the officer's  
22 testimony?

23 MR. WOOD: Yes.

24 THE COURT: Okay. But that's after the two steps?

25 MR. WOOD: Yes, he believes that -- he doesn't ever

1 remember advancing any more after he moves Mrs. Samuel over to  
2 the driveway. Right.

3 Now, other people, the next door neighbor and Mrs.  
4 Samuel put him further out into the yard which would be, that  
5 would be going, I guess, to the north.

6 THE COURT: All right, help me out in terms of  
7 discretions then.

8 MR. WOOD: The photograph in Exhibit No. 13 in the  
9 motion for summary judgment is looking to the east, so that the  
10 right would be to the south.

11 THE COURT: Right.

12 MR. WOOD: And the left would be to the north.

13 THE COURT: Right. And then where did the body rest.

14 MR. WOOD: Judge, if you look at that post that's on  
15 edge of the porch.

16 THE COURT: Yes.

17 MR. WOOD: Right behind that post.

18 THE COURT: Right. So in any event, in the light most  
19 favorable to the plaintiff here, when he advanced the two steps  
20 he's still on the porch about in line with the post there?

21 MR. WOOD: I would agree with that, yes, sir.

22 THE COURT: All right. Go ahead.

23 MR. WOOD: Officer Garrett is analyzing the situation.  
24 He knows he can't move or back up because he does not want to  
25 allow Mr. Samuel access to the lady he had just been assaulting



1 who is on the driveway at this the point and he believes -- his  
2 testimony was he believed that at that point Mr. Samuel was 10  
3 to 15 feet away from him. Mr. Samuel then took --

4 THE COURT: All right, let me ask you about that  
5 because we've had some discussion about that. I mean to some  
6 extent that's self-serving. I can't really take that into  
7 consideration when the City of Broken Arrow in their  
8 investigation said he was 27 feet and some inches; correct?

9 MR. WOOD: Well, that is true, Your Honor, and that  
10 was based on where the shell casing was found, but -- and for  
11 the purposes of summary judgment we don't dispute that. We  
12 believe that even if he was at 27 feet, under the analysis as  
13 set forth in the Larsen case, Officer Garrett was still within  
14 his right to use deadly force.

15 THE COURT: All right, but for purposes of summary  
16 judgment I have to evaluate it at 27 feet, don't I?

17 MR. WOOD: We would agree with that and I think that's  
18 how we set it forth in our papers.

19 THE COURT: All right. Go ahead.

20 MR. WOOD: Officer Garrett, believing that his life  
21 was in imminent danger, as well as Ruth Samuel's, observes Mr.  
22 Samuel begin to take another step towards him. He lifts his  
23 leg up as he had just a few seconds ago before taking two steps  
24 and Officer Garrett fires one shot striking Mr. Samuel to the  
25 chest and he falls to the ground. Officer Garrett immediately

1 calls for EMS, he goes up to the body, kicks the knife away  
2 from Mr. Samuel and within probably 15 or 20 seconds the second  
3 officer, Officer Hunsberger, arrives on the scene.

4 THE COURT: Now let's back up just a second here. You  
5 say Officer Garrett perceived that Mr. Samuel took another step  
6 toward him and there's some discussion about exactly what  
7 happened here. One of the witnesses -- and let me get her  
8 name.

9 MR. WOOD: Diana Lance.

10 THE COURT: Lance describes the movement as a jumping  
11 movement of some sort; correct?

12 MR. WOOD: Correct.

13 THE COURT: All right. Now because some of the  
14 caselaw here talks about lunging or movements toward the  
15 officer, does it make any difference whether or not the  
16 movement is characterized as a step toward or a jumping  
17 movement?

18 MR. WOOD: Your Honor, I don't think so, I think it's  
19 a furtive movement showing an intent on the part of Mr. Samuel.  
20 He's already been ordered at least three or four times to drop  
21 this knife. He's ignored all of those commands, continued to  
22 hold the knife with the blade pointed towards Officer Garrett  
23 and then takes yet another, begins to take another step towards  
24 him. And Diane Lance, of course, is directly across the street  
25 watching this from her bay window. And she likewise describes,

1 I think her term was "He was in a menacing stance" were the  
2 words that she used.

3 THE COURT: What were her exact words with regard to  
4 the movement that she perceived?

5 MR. WOOD: Yeah, I believe that's on page 47 and 48 of  
6 her deposition. Going to page 47 line 12:

7 "And from the time he came out the front door and  
8 raised his arms in the menacing stance as you described, did he  
9 ever move?

10 "Yes, sir, he did.

11 "Okay. Did he move off the porch?

12 "He looked like he could come off the porch. He  
13 jumped. I don't know if it was forward or just a jump.

14 "Question: He looked liked he could come off the  
15 porch?

16 "Yes, sir.

17 "Question: What do you mean by that?

18 "Well, when you do a motion you can either go forward  
19 or not if you jump, and I cannot make --

20 "Question: I guess you could either go forward or  
21 backwards or side to side or up?

22 "Up, correct.

23 "Is it my understanding that you believe that he went  
24 up air, like jump?

25 "Yes, sir.

1           "So the movement you saw Mr. Samuel make from the time  
2 when you saw him on the porch until he was shot, you thought he  
3 jumped?

4           "Yes, sir."

5           And, Judge, you know, it's hard to read into someone's  
6 mind what their perception was when someone observes something  
7 a little bit shocking like this in their own neighborhood, but  
8 whatever it was it could be considered a furtive movement by  
9 Officer Garrett which I believe entitled him to use deadly  
10 force at that time.

11          THE COURT: Go ahead.

12          MR. WOOD: And Judge, if you look at the case that we  
13 cited in our papers, the Estate of Larsen vs. Murr and the City  
14 and County of Denver, the case is amazingly similar and on  
15 point with what we have in our case. The Murr case was  
16 decided -- or Larsen, I'm sorry, was decided in January, 2008  
17 and that involved a call where the suspect had threatened to  
18 kill himself or somebody else. It was late at night. Officers  
19 responded to a 911 call, just as we did in this case, and when  
20 they arrived they found Mr. Larsen on the front porch of a  
21 house, elevated, I think there were six steps leading up to  
22 that porch, and he had a large butcher knife. I think even one  
23 of the officers described it as a small sword. He was ordered  
24 to drop the knife several times, but never did, and when  
25 officer Murr perceived that he was being -- aggressing him or

1 coming towards him, he fired twice and killed Mr. Larsen.

2 Of course the framework that the court uses to analyze  
3 the use of force is straight from Graham vs. Connor where they  
4 say the reasonableness of a particular use of force must be  
5 judged from the perspective of a reasonable officer on the  
6 scene rather than with the 20/20 vision of hindsight. The  
7 court goes on to cite the Graham v. Connor case and say police  
8 officers are often forced to make split second judgments in  
9 circumstances that are tense, uncertain and rapidly evolving  
10 about the amount of force that is necessary in a particular  
11 situation. The reasonableness of the officer's belief as to  
12 the appropriate level of force should be judged from that  
13 on-scene perspective.

14 So that in this case, Your Honor, I think that even if  
15 Officer Garrett's assessment of the threat was mistaken it was  
16 not objectively unreasonable.

17 The court goes on to say, gives a little outline of  
18 how to assess the threat and they set forth a number of, I  
19 think there was four of them, nonexclusive factors which  
20 included whether the officers ordered the suspect to drop his  
21 weapon, which was done in this case. Whether the suspect  
22 complied with the police commands, which he did not. Whether  
23 any hostile motions were made with the weapon towards the  
24 officers? They found in the Larsen case that the fact that he  
25 held the blade of the knife pointed towards them and then moved

1 towards them satisfied that analysis. The next factor is the  
2 distance separating the officers and the suspect; and lastly  
3 the manifest intentions of the suspect.

4 In that case the suspect had stated that he wanted to  
5 either kill himself or kill someone. In this case Mr. Samuel  
6 had already committed a felony by grabbing his wife by the neck  
7 holding her down on the ground and choking her. I believe it's  
8 21 644 O.S. H makes domestic assault and battery by  
9 strangulation a felony.

10 THE COURT: Is it clear that the officer knew of that?

11 MR. WOOD: What the officer was told on the radio when  
12 the call was assigned was that a man was physically assaulting  
13 his wife or beating her up and it was in progress.

14 Of course, the second part of that analysis is when  
15 you are confronted by someone who is armed with a weapon and  
16 they don't put it down when you tell them to, they point the  
17 blade toward you, I believe under the law that is also an offer  
18 to do harm and would also be considered a felony.

19 THE COURT: But of course the distance is one of the  
20 important circumstances here. Obviously, if I menace you with  
21 a knife from 50 feet that may not justify you, hopefully, in  
22 shooting me through the heart.

23 MR. WOOD: Correct. Judge, we presented evidence in  
24 our papers and through the affidavit of Dr. Lewinski, that  
25 based on the scientific studies that they have done in studying

1     how much distance an assailant can cover in a second and a half  
2     puts 27 feet well within the range of being in imminent danger  
3     or the suspect posing an imminent threat of harm.

4             Judge, as we've argued in our papers, we feel that  
5     Officer Garrett is entitled to judgment, first of all, because  
6     no constitutional violation occurred. Secondly, if you find  
7     that a constitutional violation occurred, he's entitled to  
8     qualified immunity because there's certainly no case that I was  
9     able to find, especially as close on point as Larsen is, that  
10    would put him on notice that such a use of force would be  
11    considered unconstitutional. In fact, in the Larsen case in  
12    section 14 the court talks about the appellant arguing two  
13    genuine disputes of material fact. And they point out that,  
14    they argued that Officer Murr provided inconsistent testimony  
15    about the circumstances of the shooting; and second, the  
16    distance separating Murr from Larsen. They said that was  
17    subject to dispute in that case. They go on to say, the mere  
18    existence of some alleged factual dispute between the parties  
19    will not defeat an otherwise properly supported motion for  
20    summary judgment. The requirement is that there be no genuine  
21    issue of material fact.

22            So with regard to this distance, there's been nothing  
23    presented to the Court that would say Mr. Samuel was incapable  
24    of reaching Officer Garrett with that knife within a second or  
25    two.

1           THE COURT: All right. So it's been a while since  
2 I've addressed one of these cases, but you're saying that if we  
3 were to determine that first -- let me take a look here to get  
4 the wording correct. If we were to determine that there was an  
5 issue of fact as to whether the officer's actions in using  
6 deadly force was objectively reasonable in light of the  
7 circumstances confronting him, then you're saying as to the  
8 second evaluation for purposes of qualified immunity, is that  
9 you are saying that there's no case that would put him on  
10 notice that such a use of force would be considered  
11 unconstitutional?

12           MR. WOOD: Judge, I don't think so, especially if you  
13 had a police officer read this case, I think it tells them that  
14 distance is one of those factors to be considered, but as in  
15 all Fourth Amendment analysis, eventually it's going to be on  
16 the totality of the circumstances.

17           THE COURT: All right, so you're saying this case you  
18 are talking about Larsen?

19           MR. WOOD: No, the Samuel vs. Garrett case. Okay.

20           THE COURT: All right. You're saying it's such a gray  
21 area that he would be entitled to qualified immunity?

22           MR. WOOD: Right. One of the things that's been  
23 argued in this case, the Larsen case and our case, is a  
24 training rule that developed in the early '80s, mid '80s,  
25 called the 21-foot rule. And basically officers were trained



1 that if someone had an edged weapon and got within 21 feet of  
2 you, you were in imminent or immediate threat of harm. Okay.  
3 Of course plaintiffs' lawyers have seized on that and tried to  
4 use it, as it's been attempted to use in this case, to say if  
5 you're further than 21 feet away and use deadly force, then  
6 it's unreasonable. That was never the intent of this training  
7 rule nor is that type of bright line rule consistent with the  
8 analysis formula that's been set forth by the Supreme Court in  
9 Connor, Graham vs. Connor, Brosseau vs. Haugen, Harris vs.  
10 Scott. All those cases say you have to look at each case  
11 individually and determine that under the totality of the  
12 circumstances. And I think the court is right on point in  
13 Larsen when they say that the distance is just one of several  
14 factors to be taken into account. In fact, on 1262 in the  
15 Larsen case, and I'll read there into the record. "In  
16 assessing objective reasonableness we employ no bright line  
17 rules, and in a totality of the circumstances analysis,  
18 distance is but one factor of many. Our cases decline to adopt  
19 a per se rule where distance alone would create a fact question  
20 as a matter of law."

21 THE COURT: Do they discuss the 21-foot rule in  
22 Larsen?

23 MR. WOOD: Yes, they did, Your Honor, I believe they  
24 did. I think there was footnote about that if I'm not  
25 mistaken. Let me look.

1           THE COURT: Certainly that quotation that you just  
2 read would seem to imply that they were directing that to some  
3 sort of absolute bright line rule.

4           MR. WOOD: Correct. Judge, I'm not finding that right  
5 now, but on our second go around if I find it I'll bring it to  
6 the Court's attention.

7           THE COURT: All right, my recollection on qualified  
8 immunity -- and it's frankly a little surprising that I haven't  
9 had a qualified immunity case for awhile -- but as I recall the  
10 caselaw, it's got to be something clearly established within  
11 this circuit; correct?

12           MR. WOOD: Correct, Your Honor. It's a two-pronged  
13 test set forth in Saucier vs. Katz and the first prong of that  
14 test is did a constitutional violation take place. The second  
15 prong of the test is was the law clearly established at the  
16 time of the incident. And then about four or five years ago in  
17 the case of Pearson vs. Callahan, the court said you don't have  
18 to take your analysis in the order set forth in the Saucier  
19 case. You can look at, first, whether there is any established  
20 law at the time of the incident which would put the officer on  
21 notice that his acts were unconstitutional.

22           THE COURT: These sorts of cases seem to arise a lot  
23 in terms of knives, and although this is relatively irrelevant,  
24 it's one of these cases. As you-all know, and with experienced  
25 lawyers on both sides, truth is often stranger than fiction.

1 And I had a case involving an individual who had been trying to  
2 take his own life in his sister's bathtub on the north side and  
3 the police were called and they came into the bathtub he had a  
4 long butcher knife he came at the police. You were not  
5 involved in this case --

6 MR. WOOD: No, I was not.

7 THE COURT: -- and this is irrelevant to this  
8 particular case, but I just thought you would both appreciate  
9 the facts here. And he was nude. The police backed out into  
10 the front yard. He came out through the front door at a fairly  
11 high rate of speed. The light on the front porch was off and  
12 he came off the porch at them with the knife over the head and  
13 he winds up getting shot in the back. And of course, getting  
14 shot in the back is kind of a bad sign if you are a defendant,  
15 but it turns out that when we tried the case he hit the railing  
16 below his waist and came flipping over and was upside down when  
17 the shots were fired and that's how he got shot in the back.

18 MR. WOOD: Your Honor, in police cases like that one  
19 and in police training nowadays, they teach you that your  
20 target or what you shoot at is a target that's in the past  
21 because by the time it takes you to decide to pull the trigger  
22 and you pull the trigger, the movements of the suspect can be  
23 quite different than the sight picture you had when you made  
24 that decision to shoot. Which brings me to my very last point.

25 THE COURT: Which no one at summary judgment was able

1 to explain how he got shot in the back. So I think we wound up  
2 going to trial and it became very clear to everybody. So go  
3 ahead.

4 MR. WOOD: After this was responded to by the  
5 plaintiff we submitted some evidence from the ME's report. One  
6 of those was a picture that shows a wound trajectory rod placed  
7 in Mr. Samuel's chest at the time of autopsy and it has a  
8 downward angle. I don't think it's disputed that Officer  
9 Garrett was straight, pretty much straight in front of Mr.  
10 Samuel when he shot him, he might have been slightly down in  
11 elevation because he was standing in the yard and not on the  
12 sidewalk or the porch, but the downward trajectory of the  
13 bullet indicates to us that Mr. Samuel was in motion when he  
14 was shot, he wasn't standing straight up with his hands like  
15 this. He had started to move and that would explain the  
16 downward trajectory of the bullet.

17 THE COURT: Do we have any expert opinion analyzing  
18 that downward --

19 MR. WOOD: Only the ME's report.

20 THE COURT: All right. Anything else?

21 MR. WOOD: Nothing further, Your Honor.

22 THE COURT: Mr. Miles.

23 MR. MILES: Thank you, Your Honor. Your Honor, first  
24 of all, with regard to the last issue that Mr. Wood brought up  
25 regarding the trajectory of the bullet, we have not had an

1 opportunity to respond to that allegation, it was new material  
2 that was set forth in his reply, and we do take issue with that  
3 and would like the opportunity to respond if the Court sees fit  
4 that we need to do so.

5 THE COURT: Well, insofar as its in the reply, as you  
6 are well aware if I consider that then I have to give you an  
7 opportunity to respond and it just perpetuates the briefing  
8 forever so if that's in fact true that it's not raised until  
9 the reply, as a factual matter I cannot consider it for  
10 purposes of summary judgment anyway. So go ahead.

11 MR. MILES: Okay. Thank you, Your Honor. I think the  
12 real dispute revolves around the question of whether or not  
13 there was a constitutional violation here. In other words, was  
14 Officer Garrett justified in pulling the trigger on Mr. Samuel  
15 that evening. There are a lot of facts that we have a  
16 particular dispute with that may not necessarily go to that  
17 particular direct issue. What we do know and what we do  
18 believe is undisputed, that when Mr. Samuel entered the house  
19 that evening Officer Garrett was told in words that he's got a  
20 knife or he was getting a knife. That's not disputed. At that  
21 time we believe the evidence shows that Officer Garrett at that  
22 time drew his weapon. This was before Mr. Samuel came out of  
23 the residence. The configuration of the house, if you look at  
24 the photograph with the front door, when the front door opens  
25 up there is a view down the hallway towards the kitchen. I

1 believe the evidence is, and will show and does show for the  
2 record, that Officer Garrett was not able to see Samuel in the  
3 kitchen itself, but he heard the drawer and utensils rattling.  
4 I believe the first time that Garrett, according to his  
5 testimony, saw Samuel was when he came through the threshold of  
6 the house and at that time his arms were raised above his head  
7 with a 10-inch knife. Now it's been described as porterhouse  
8 steak knife or a butcher knife, but there's a photograph of the  
9 knife in the record, it had a five inch blade, it was a steak  
10 knife. At the time --

11 THE COURT: So the 10-inch knife includes the handle?

12 MR. MILES: It includes of the handle. So it's a  
13 five-inch blade. When he steps through the threshold he stops  
14 with his arms above his head at that point. He takes two more  
15 steps and stops and is told by Officer Garrett to drop the  
16 knife. At this time, from the testimony from the witnesses,  
17 are that Nathan Samuel kept his hands above his head the entire  
18 time throughout this whole ordeal until he was shot. The  
19 photographs in the record in our reply to Officer Garrett's  
20 motion that show Garrett describing the position of Samuel's  
21 hands and also photographs from Mrs. Lance across the street to  
22 show the position of Garrett's hands. As Garrett described it,  
23 he was holding the knife in a position like this with the blade  
24 pointed towards him and the hands were elevated above the head.

25 It's undisputed that Nathan Samuel never said a word

1 to Officer Garrett that evening at all. There was never  
2 anything said by Mr. Samuel. It's undisputed that Officer  
3 Garrett never warned Samuel that he's going to shoot him. The  
4 testimony reflects that when Samuel stepped through the door,  
5 stepped through the threshold he took two steps and stopped.  
6 Garrett told him to drop the knife. Samuel took one more step  
7 forward, again with his arms extended before his head.

8 THE COURT: One or two?

9 MR. MILES: Initially he took two steps and then with  
10 he took one more step. When he took the second step his arms  
11 again were still extended above his head. Garrett told him  
12 again to drop the knife. It was at that point that Garrett  
13 said he made the decision that if he takes another step I'm  
14 going to shoot him. And the testimony from Garrett is that he  
15 started to take another step and he described it as him lifting  
16 his right leg and that's when the shot was fired.

17 Ms. Lance, across the street, described the situation  
18 at the time Samuel was shot was it looked like, it appeared to  
19 him that she {sic} jumped up in the air, not forward, not  
20 backward, not side to side, but up. With regard to the --

21 THE COURT: Well, now we just went over that  
22 testimony, and you're construing it as the body jumping after  
23 it was hit by the round, if I'm hearing you correctly. But I  
24 just read her testimony or rather it was just read into the  
25 record and I didn't read it that way. Do you want to go over

1       that?

2               MR. MILES:  No, I don't dispute the way, the  
3       conclusion you've drawn from her testimony.  I think she  
4       described his movement as jumping up.  Now whether or not that  
5       was before or after the shooting, I don't think the testimony  
6       can tell us that, but it was at that moment.

7               THE COURT:  Well, but that's what I'm saying, because  
8       your implication is that he jumped when the round hit him,  
9       that's what you're implying to me, but I don't know that you  
10      can read that into what was just read here by counsel.

11              MR. MILES:  And I accept that, Your Honor, and I take  
12      her testimony for exactly what she said.  She described him as  
13      jumping up.

14              THE COURT:  All right, but the question is as to when.  
15      Let me take another look at that.  What was he hit with by the  
16      way, was it a .40 caliber?

17              MR. MILES:  I think it was a .40.

18              MR. WOOD:  It was, Your Honor.

19              MR. MILES:  I believe it's 47 and 48, Your Honor.

20              THE COURT:  Right.  You see, the language here in her  
21      testimony on page 48, lines 14 through 16, she says, "When he  
22      went up to either come off the porch or jump up which at that  
23      time the officer had to make a decision and, yes, I heard a  
24      gunshot."  Doesn't that suggest that the movement came before  
25      the shot?



1           MR. MILES: I think that it would be fair to conclude  
2 that, Your Honor. If you read on down at the end of the page  
3 the question was asked, "Was he up in the air when he was shot?"

4           "Sir, I would not able to determine that. I know that  
5 he jumped and he was shot and he fell."

6           THE COURT: Okay. Go ahead.

7           MR. MILES: The point being, Your Honor, at that  
8 moment Mr. Samuel was not making any aggressive, taking an  
9 aggressive action towards Officer Garrett at that time in  
10 either lunging at him, running towards him, slashing the knife  
11 at him or anything else, which would create an imminent threat  
12 of danger to Officer Garrett at the time.

13           We've discussed earlier the distance and the  
14 investigation of the Broken Arrow Police Defendant indicated  
15 that it was 27 feet, 11 and 3/8th inches. We've got testimony  
16 of Diana Lance who said Officer Garrett was in the yard; we've  
17 got testimony from Jimmy Franklin that said Garrett was in the  
18 yard; testimony of Ruth Samuel that says Garrett was in the  
19 yard; and Officer Garrett testified that from the time he drew  
20 his weapon he never moved. So we believe there certainly is a  
21 question of fact as to the location of where Officer Garrett  
22 was, assuming Officer Garrett takes the position he was 10 to  
23 15 feet away from him.

24           THE COURT: Well, I understand that. I don't know  
25 that he even says that. He says he perceived he was 10 or 15

1 feet.

2 MR. MILES: Yes.

3 THE COURT: But as I say, I don't know that I can  
4 consider that for purposes of summary judgment here. There's  
5 no question that he was in the yard; right?

6 MR. MILES: That's correct.

7 THE COURT: Everyone says he was in the yard.

8 MR. MILES: That's correct.

9 THE COURT: And your understanding, he was essentially  
10 straightaway from the front door?

11 MR. MILES: Correct.

12 THE COURT: Right.

13 MR. MILES: Correct. Your Honor, we believe that a  
14 reasonable officer under those conditions would not have made  
15 that decision to execute lethal force at that point in time  
16 under these facts.

17 THE COURT: All right, given that there's no bright  
18 line here, the Tenth Circuit has said, how am I to consider the  
19 21-foot rule? I'm told by the folks that grade my papers I  
20 can't consider that as a bright line. I'm to consider the  
21 totality of the circumstances; correct?

22 MR. MILES: And I think that is one of the factors  
23 that the Court certainly can consider, the distance between the  
24 suspect and the defendant in this case. And the fact that  
25 there was no warning given to Mr. Samuel that he was to be shot

1 if he did not drop the knife, I think is clearly a violation of  
2 the law. It's undisputed that Officer Garrett gave no warning  
3 to Mr. Samuel that he was to be shot.

4 THE COURT: All right. Given that two warnings were  
5 given to drop the knife and the weapon was directed at Mr.  
6 Samuel, do you think it is a constitutional violation per se if  
7 no warning is given?

8 MR. MILES: I think the law requires that some warning  
9 be given if feasible, and I think that the order -- I would  
10 argue that it's a command to drop the knife -- doesn't  
11 necessarily give Samuel fair warning that he is subject to  
12 being shot if he didn't do that under those circumstances.

13 The other question, Your Honor, I think the Court  
14 should consider is that you have to look at the circumstances  
15 that existed at the time Officer Garrett arrived. At the time  
16 Officer Garrett arrived he did not know that Ruth Samuel  
17 allegedly had been strangled as asserted by the defendant in  
18 their motion. The testimony from Officer Garrett was that when  
19 he arrived he approached Ruth Samuel and she told him  
20 everything was okay.

21 THE COURT: Well, right, but that's why I asked what  
22 he knew. Do you contest that he was told that a man was  
23 physically assaulting his wife and beating her up -- or beating  
24 her up and that it was in progress?

25 MR. MILES: I don't dispute that. It was a domestic

1 violence call that came in over the radio. But I think it's  
2 also important to note at the time that he exited his vehicle  
3 he took his Taser with him, grabbed it from the inside the car.  
4 He had that available to him at the time.

5 THE COURT: A Taser is not very effective against a  
6 knife though, is it?

7 MR. MILES: Well, I suppose it depends upon at what  
8 distance. I don't --

9 THE COURT: No, I guess I'm thinking in terms of the  
10 electrode, dual electrode, they have to be in contact. You're  
11 talking about a Taser that shoots?

12 MR. MILES: Shoots.

13 THE COURT: With the wire attached to it?

14 MR. MILES: Yes, sir.

15 THE COURT: All right. I don't even know, what is the  
16 range on one of those things, do you happen to know?

17 MR. MILES: From what -- and I don't think this is in  
18 our record, but from I understand it's less than 20 feet to be  
19 effective as far as being able to shoot and hit someone. And  
20 we would argue it's not effective at 27 feet. But obviously he  
21 had his service weapon drawn and -- at the time Mr. Samuel  
22 exited the residence. We believe that Officer Garrett had  
23 ample time to consider what he was doing before he pulled the  
24 trigger. He had his weapon drawn on Samuel when he stepped out  
25 of the house and took two step forward and made a conscious

1 decision not to shoot him then. And he took one more step  
2 forward and he made a conscious decision not to shoot him then.  
3 It was only when he started to take another step that Mr.  
4 Samuel was shot. And all the while, Mr. Samuel was still on  
5 his own front porch, he never left his porch. So we believe  
6 that the facts taken in the light taken most favorable to the  
7 plaintiff, arguably a constitutional violation exists.

8 And with regard to the issue of qualified immunity,  
9 Your Honor, we do believe that the Tenth Circuit, there was  
10 existing caselaw in the Tenth Circuit at the time that would  
11 support the notice on the part of Officer Garrett. Obviously  
12 the Murr case discussed the same type of situation. There's  
13 also --

14 THE COURT: Which case, I'm sorry?

15 MR. MILES: The Larsen vs. Murr case.

16 THE COURT: Oh, right. Got it.

17 MR. MILES: There was also the case of Walker vs. City  
18 of Orem, O-R-E-M that's cited in our brief, Your Honor, that  
19 specifically states that it was specifically established that  
20 where an officer had reason to believe that a suspect was only  
21 holding a knife, not a gun, and the suspect was not charging  
22 the officer and had made no slicing or stabbing motions towards  
23 him, that it was unreasonable for the officer to use deadly  
24 force against the suspect. And that's was citing a case called  
25 Zuchel vs. City and County of Denver.

1           THE COURT: Yes, I've got that. That was a Layn  
2 Phillips case.

3           MR. MILES: Yes, sir. So for those reasons, Your  
4 Honor, we would request that the motion for summary judgment of  
5 Officer Garrett be denied.

6           THE COURT: Thank you very much. Mr. Wood.

7           MR. WOOD: Just briefly, Your Honor. As we point out  
8 in our reply brief, the Walker vs. Orem case is materially  
9 different factually and we don't think that it could be  
10 presumed to have put defendant Garrett on notice that his  
11 actions would be considered a violation of Mr. Samuel's  
12 constitutional rights. In Walker they were responding to a  
13 call involving an individual who posed a danger, first of all,  
14 only to himself. He had not made any threats, not done any  
15 violence to anyone, including himself. He was only in the  
16 possession of a two-inch box knife that he was holding to his  
17 own wrist. I'm trying to think when the Orem case was decided.

18          THE COURT: 2006.

19          MR. WOOD: Okay. A two-inch box knife to me, or you  
20 might ask any of those people that were on the airplanes on  
21 9/11 if a two inch box knife can be considered a deadly weapon.  
22 There was only one group of people that had enough stones to  
23 take them on under those circumstances. So we think it's  
24 factually very different from the case that we have at bar and  
25 quite different from the Estate of Larsen.

1           I think we cleared up the discussion about whether he  
2 jumped or not. That's Hollywood myth stuff that someone is  
3 going to jump if you are shot with a .40 caliber handgun.  
4 Officer Garrett's testimony was that he dropped straight to the  
5 ground. One plausible explanation of how Mrs. Lance saw things  
6 and how Officer Garrett saw things, is Officer Garrett was  
7 looking down the sights of a gun pointed at center mass. Mrs.  
8 Lance was across the street and had a much wider view. What  
9 she describes is consistent with Officer Garrett in this way.  
10 Officer Garrett said he saw a foot come up to start to step  
11 towards him. If someone had decided to charge, one of the  
12 first things they are going to do is maybe start off or get a good  
13 traction or start forward in a rapid manner. What she  
14 describes is consistent with that. But either in combination  
15 or taken separately that is a furtive movement with someone who  
16 has refused to drop a deadly weapon and Officer Garrett was  
17 entitled to use deadly force to protect himself and Mrs.  
18 Samuel.

19           THE COURT: Thank you, Mr. Wood. Ms. Wilkening. It's  
20 a pleasure to have all of you as lawyers who actually try cases  
21 in state court as opposed to all of these highfalutin lawyers  
22 who do nothing but federal work. I've got some folks who  
23 understand the real world here for a change. Go ahead.

24           MS. WILKENING: May it please the Court, I'm going to  
25 do my very best not to rehash everything that has already been

1 said particularly with regard to the constitutional violations,  
2 but if Court will indulge me there are a couple of points that  
3 I would like start out with refuting before I frankly forget  
4 what they are.

5 One of the things that I want to talk just briefly  
6 about is the issue regarding lack of warning. And I think it's  
7 pretty important that the Court recognize the fact that there  
8 is no requirement in the law that a warning be issued prior to  
9 an officer utilizing deadly force. The deadly force policy of  
10 the Broken Arrow Police Department, it specifically provides  
11 that where feasible a verbal warning shall be given to the  
12 offender prior to the use of deadly force. In this particular  
13 case I believe that it should have been fairly clear to Mr.  
14 Samuel, as he had a loaded gun pointed at him with the officer  
15 saying "drop the knife, drop the knife," that the use of deadly  
16 force was a very real possibility. But more importantly the  
17 case of Thompson vs. Salt Lake City which is a Tenth Circuit  
18 case that came down in 2009, it specifically provided that a  
19 warning by police officers is not required under the Fourth  
20 Amendment reasonableness standard. Now in this particular  
21 case, and I think that all of the research tends to support  
22 this allegation, is that when you're dealing with an individual  
23 that has a knife or a gun or something to that effect, it's  
24 very important for the officer to give short, very specific  
25 commands. And in this particular case that's what transpired.



1           The other thing, and I know we've kind of beaten the  
2 21-foot rule to death here, but I would really like an  
3 opportunity to respond from the City of Broken Arrow's  
4 standpoint. The research consistently shows that 21 feet is  
5 the distance that an individual with an edged weapon can  
6 advance on an officer and attack him before the officer can  
7 recognize the threat, determine his course of action and  
8 implement that action. And we performed -- and I don't mean to  
9 be trite by bringing this up, but I think it's kinds of an  
10 important observation, particularly in lieu the Estate of  
11 Larsen case. I performed kind of an unscientific test in my  
12 own home. I gave my husband a glue gun. I put on a pair of  
13 flip flops and grabbed a pen, backed away by 21 feet, and when  
14 he said go, I ran. He concluded that he shot me and I  
15 concluded his intestines were laying on the ground. Mainly  
16 what happened was he the got ink on his shirt.

17           But I think what the court was trying to say in the  
18 Estate of Larsen case is we're not going to establish a bright  
19 line rule with regard to the distance. And I think that that  
20 was well thought out by the court because you don't want an  
21 officer, as mentioned by Mr. Wood in this particular case, when  
22 you're dealing with a very compressed time frame of 60 to 90  
23 seconds, you don't want the police officer to say, oh, wait  
24 just a minute, are you 21 feet from me or 27 feet from me? I  
25 think as the court has indicated numerous times, you have to

1 consider the totality of the circumstances. And something else  
2 that I think that's pretty important in this particular case is  
3 the fact that you had the plaintiff, Mrs. Samuel, and the  
4 neighbor located in very close proximity to where Mr. Samuel  
5 was standing with a knife and he certainly, if they were  
6 standing, as they have testified they were in front of the  
7 garage, he certainly could have closed the distance between to  
8 them fairly quickly.

9           If you go back and you look at the City of Broken  
10 Arrow's or the police department's policy with regard to the  
11 use of deadly force, the police officers have the ability to  
12 use deadly force if they believe that their lives or the lives  
13 of someone else are at great risk. And that was something I  
14 think that maybe was just slightly overlooked in the previous  
15 argument, and that's the fact that he very quickly and very  
16 easily could have gotten to either one of those individuals and  
17 caused some significant harm to them. Just for purposes of  
18 mentioning it, the 27 feet that was identified during the  
19 course of the investigation, that wasn't necessarily an  
20 identification of the exact location of where the officer was  
21 standing. There are many factors that play into it. It was  
22 simply an estimate, Your Honor. I certainly can embrace the  
23 Court's perspective that, you know, that was approximately  
24 where it is, but when you examine the totality of the  
25 circumstances with regard to this particular case, the location

1 of the witnesses, his failure to respond to the lawful command,  
2 by the fact that he had already exercised harm on someone else,  
3 and although not known to the officer in advance of this, his  
4 state of mind at that time, as he told Mr. Franklin was -- or  
5 as Mr. Franklin overheard him say, if the cops come, I'm going  
6 to get a knife and make them shoot me.

7 THE COURT: Of course I can't consider that for our  
8 purposes today; correct?

9 MS. WILKENING: I understand. Really the landmark  
10 issue or the landmark case with regard to these types of  
11 actions against cities is Monnell vs. The New York City  
12 Department of Social Services. And in that particular case the  
13 United States Supreme Court said we are going to adopt a  
14 two-pronged test with regard to application of 1983 liability.  
15 The first prong of that test is a demonstration that the  
16 employee committed a constitutional violation. Now rather than  
17 go back and rehash all of the facts that have previously been  
18 set forth, I think it's clear under the totality of the  
19 circumstances that there was in fact no constitutional  
20 violation.

21 The second prong of the test is that a municipal  
22 policy or custom was the moving force behind the constitutional  
23 violation. Now in this particular case the plaintiff has not  
24 demonstrated any flawed police department policy, procedure or  
25 claim. You know, it was kind of interesting going through this

1 briefing process because typically that's what plaintiffs and  
2 their attorneys really seem to focus on is application or  
3 allegation with regard to the policy issue. And that really  
4 wasn't set forth. I mean, the expert retained by the  
5 plaintiffs never came out and said, you know, I find that the  
6 policy, the deadly force policy is unconstitutional, and they  
7 couldn't because it wasn't. If you go back, the genesis of  
8 that policy, and probably of every deadly force policy  
9 throughout the United States was the Tennessee vs. Garner. And  
10 the Broken Arrow Police Department continually updated that  
11 policy and in accordance with the evolution of the court cases.

12           You know, and as set out in Carr vs. Castle, you know,  
13 I think it even takes it a step further with regard to this  
14 Monnell standard. Officers may use deadly force when a suspect  
15 threatens an officer with a weapon, which happened in this  
16 particular case, or there's probable cause that the suspect has  
17 committed a crime involving the infliction or threatened  
18 infliction of serious physical harm. Now clearly in this  
19 particular case Officer Garrett was aware that there had been  
20 harm inflicted.

21           Now, I would like to take just a minute and talk about  
22 the failure to train claim. You know, importantly, a city can  
23 only be held liable on a failure to train theory if the failure  
24 to train amounts to deliberate indifference to the  
25 constitutional rights of the person with whom the police come

1 into contact with. Now, if you back that up just a little bit  
2 and you look at the materials that were submitted with the  
3 City's motion for summary judgment, Officer Garrett was well  
4 trained. He was trained in accordance with constitutional  
5 provisions. You know, he went through a CLEET academy as  
6 required by the state. He came back, he went through an  
7 extensive FTO training procedure and he received constant  
8 training and updating by way of the Broken Arrow Police  
9 Department.

10 Now in this particular case the plaintiff can't point  
11 to any flaw in the training, let alone deliberate indifference.  
12 Now, they tried to point out a few things. Interestingly  
13 enough, the things that were pointed out by the plaintiff's  
14 expert didn't really hit on the issue of policy or custom, they  
15 really went more to training. And if you look, and you really  
16 have to kind of wash it out and flesh it out to try to figure  
17 out exactly what he was saying, but very -- in its most basic  
18 form what their expert was saying was that he should have  
19 waited in the car, he shouldn't have gotten out and approached  
20 Ms. Samuel until the backer arrived. Well, there are a couple  
21 of problems with that. I mean, I think that that probably  
22 does, if in fact that does happen in other jurisdictions -- I  
23 can't imagine that it does -- but the first problem is you make  
24 a target of yourself. You know, Mr. Samuel was on a mission.  
25 He kicked the door in, he went in, he got a knife. What if he

1 had gotten a gun? The officer would basically be making a  
2 target of himself by remaining in the vehicle. Second of all,  
3 I think that the taxpayers of the City Broken Arrow and other  
4 municipalities in the state of Oklahoma, I think that they have  
5 expectation that when an officer arrives, if there is a victim  
6 that has been physically assaulted, that they will exit their  
7 vehicle and go and find out what transpired, do they need  
8 medical attention, is there a risk they're going to return with  
9 a weapon, is the situation going to be escalated, that type of  
10 thing. There was no violation of policy because there was a  
11 backer assigned. Officer Garrett was the backer, he just  
12 happened to get there first, there was another officer on the  
13 way.

14           The third allegation that I was able to pick up from  
15 the plaintiff's expert's report was that Officer Garrett, that  
16 he actually escalated the situation because he didn't take  
17 cover behind his patrol vehicle when Mr. Samuel exited with a  
18 knife. And then we pressed on that issue with regard to the  
19 close proximity of Mrs. Samuel and Mr. Franklin, I mean the  
20 conclusions were simply that he should have yelled to them,  
21 "Okay, go take cover." And that's just nonsensical, Your  
22 Honor. He was, Mr. Samuel was in very close proximity to the  
23 plaintiff and also to Mrs. Franklin {sic}. I think that the  
24 taxpayers have an expectation if officer is there and  
25 responding that he shouldn't just save his own hide by running

1 behind a police car and then yelling to bystanders, "Okay, go  
2 run to Mr. Franklin's house." In that particular case his use  
3 of force was reasonable and it was necessary to disarm the  
4 threat.

5 In this particular case I think the Court has to  
6 examine, and we brought it up in both of our briefs, the Carr  
7 vs. Castle case. It identifies four factors to be established  
8 in addition to proving that the training was inadequate. Now,  
9 I won't bore the Court with going through those. It's simply  
10 our assertion that they are wholly inapplicable in this  
11 particular case. However, what is important is the one aspect  
12 of that that requires deliberate indifference. And in this  
13 particular case there was no indication that the Broken Arrow  
14 Police Department acted with deliberate indifference to Mr.  
15 Samuel or anybody else.

16 Now I think it was the Zuchel case, if you go back and  
17 look at it, and the Tenth Circuit said, okay, there are going  
18 to be times when we will find that law enforcement agencies,  
19 a/k/a cities, have acted with deliberate indifference. And as  
20 examples of that they provided a situation, I think it may have  
21 even been it is City of Denver Police Department where the  
22 D.A.'s office had repeatedly notified the police department,  
23 you continue to use excessive force, your policies aren't  
24 consistent with constitutional law and you're failing to train  
25 your officers. That was simply not the case here. I think

1     that there are two very important distinguishing factors.  
2     Number one, in the five years preceding this incident the City  
3     of Broken Arrow had had several excessive force type cases  
4     reviewed by the district attorney's office. Now that's done in  
5     accordance with our policy. In each of those cases -- now, of  
6     course, as the Court knows, the City of Broken Arrow is lucky  
7     enough to straddle two different counties, so we've got Wagoner  
8     County and Tulsa County. So in some ways you've got somewhat  
9     of an increased scrutiny because you've got two different  
10    district attorneys' offices reviewing these types of cases.  
11    And in all of those cases the district attorney found that the  
12    use of force was not -- it was not criminal and that there  
13    wasn't any sort of improper use of force.

14               Now taking this to its logical conclusion is, as an  
15    organization, they didn't have a problem with acting with  
16    deliberate indifference to anybody else. You know, let's look  
17    at the officer individually. If this had been a situation  
18    where this particular officer, Officer Garrett, was repeatedly  
19    being he investigated, whether it was substantiated or not, for  
20    claims of excessive force or deliberately mistreating  
21    individuals or, you know, if he had been disciplined for it,  
22    any of those sorts of things, I think this would be a different  
23    case. But that's simply not the case. We've provided through  
24    the course of discovery a memorandum from the Internal Affairs  
25    Division that indicated that he had had a couple of complaints,



1 complaints generated internal to the police department and  
2 external that came in. The only one that was substantiated was  
3 a claim of the hideous offense of rudeness. And if memory  
4 serves, it was because he told someone that their house was  
5 dirty. Well, I will have to keep him out of my house for sure,  
6 because I'm quite certain that my house would rise to the level  
7 of dirty. However, him commenting on the cleanliness of my  
8 house wouldn't necessarily make me afraid that he was going to  
9 then beat me up.

10           So in this particular case I think -- well, I believe  
11 that the plaintiff can't substantiate a claim of failure to  
12 train.

13           Finally, let's talk just a little about the tort  
14 violations because in the City of Broken Arrow we are lucky  
15 enough to be able to have numerous claims filed against us no  
16 matter what the situation typically. In this particular case  
17 it's a little bit different because the plaintiff, unlike the  
18 typical shotgun approach of, okay, you were negligent and then  
19 the City gets to try to figure out how. In this particular  
20 case the plaintiff specifically pled that the City was  
21 negligent in the training, supervision and retention of Officer  
22 Garrett. Well, I think the training allegations is out the  
23 window for all of the reasons that we've set forth in our brief  
24 and have previously been discussed. However, to survive  
25 summary judgment with regard to the tort claim, the state court

1 claim actions, the plaintiff must show that the City was  
2 negligent in the supervision or retention of Officer Garrett,  
3 and they simply can't do this. As previously mentioned, there  
4 is no disciplinary history to indicate problems, there's no  
5 department history whatsoever to indicate any problems. And  
6 under established law the plaintiff would have to show that the  
7 City had reason to believe that Officer Garrett would create  
8 undue risk of harm to others, and there's just simply no  
9 evidence to that effect.

10 If you couple that with the exceptions to liability  
11 under the Tort Claims Act -- I really hate to go through those  
12 because they are long and everybody is probably tired and ready  
13 to be done with this -- but I mean there are a number of  
14 exceptions that the City would be entitled to, not the least of  
15 which would be with regard to acting within the recognized  
16 standards which we believe that actually occurred in this case.

17 Finally, you know, the Estate of Larsen case is, I  
18 believe, Your Honor, really dispositive with regard to this.  
19 And you know, whenever I try a criminal case or argue a case in  
20 civil court, state or federal, I guess I always sort of look to  
21 the scales of justice, you know, Lady Justice. And you know,  
22 if you do that in this particular case, and you start out with  
23 all those things that were examined by the Tenth Circuit in the  
24 Larsen case, they are just heavily, heavily applicable here.  
25 Larsen had already threatened violence. We know that that

1 certainly had occurred in this particular case. Not only had  
2 Mr. Samuel threatened violence he had effectuated violence.  
3 The officers responded to an emergency call late at night.  
4 That happened in this particular case. When officers arrived  
5 they encountered a man with a knife. Well, Officer Garrett got  
6 there, but shortly, very, very shortly thereafter he came out  
7 with a knife. The officers told Mr. Larsen to put down the  
8 knife. Mr. Samuel was told twice, "Drop the knife. Drop the  
9 knife." Larsen refused to he is drop the knife. Mr. Samuel  
10 refused to drop the knife. Larsen raised the knife above his  
11 shoulders and pointed the tip towards the others. It's  
12 factually, Your Honor, very, very similar. He was prepared to  
13 use force and was moving in a position to be able to do so.  
14 You know, he began to take that fateful step forward. You  
15 know, if you take Ms. Lance's perspective from that, he jumped.  
16 But in any event the officer, I think, who was entitled -- you  
17 know, the standard is reasonableness and I think it was  
18 reasonable in this particular case for him to conclude that Mr.  
19 Samuel was moving towards him. And he was on the porch, just  
20 like he was in the instant situation.

21 So thank you, Your Honor, for agreeing to hear oral  
22 argument on this case. We would respectfully request that the  
23 Court grant motion for summary judgment in the City's favor.

24 Thank you.

25 THE COURT: All right, I'm going to ask about the

1 pendent negligence claim and you made reference to it. Now, I  
2 had read just personally, in looking at the petition here,  
3 training, supervision and retention as part of the Section 1983  
4 claim, but you're reading that as part of a pendent state tort  
5 claim?

6 MS. WILKENING: Well, I think -- we're about to test  
7 how good my memory is, but in this particular case I don't know  
8 that there is any 1983 federal type cases that contemplate --  
9 that contemplate supervision or retention claims because that  
10 is falls under, I believe, under the category of respondeat  
11 superior which the United States Supreme Court has been very  
12 clear you cannot have a claim of respondeat superior under a  
13 1983 action. Now the training, I think, could be considered  
14 under both, so that was why I addressed it under both the  
15 negligence standard from the state tort claims perspective as  
16 well as with the federal law. But I think I addressed that in  
17 my original motion for summary judgment. It's my belief that  
18 there isn't any available remedy for supervision or retention  
19 under federal law. But nonetheless, even if my reading of the  
20 law is incorrect, they would still have to demonstrate  
21 deliberate indifference which is a threshold that I do not  
22 believe can be met.

23 THE COURT: All right, even under state law?

24 MS. WILKENING: I don't think that a deliberate  
25 indifference standard would apply to the state law.

1           THE COURT: Correct.

2           MS. WILKENING: I guess I'm taking it with regard to  
3 the federal case.

4           THE COURT: I see. I see. So with regard to this  
5 respondeat superior issue, talk to me about that.

6           MS. WILKENING: Okay. This is one of my favorite  
7 things to explore because in some ways it's what came first,  
8 the chicken or the egg, but if you take it strictly from a  
9 state law perspective, if an officer is acting outside -- and  
10 that's any officer, any employer officer acting outside the  
11 scope and course of their employment, then the city itself  
12 cannot be liable. Now of course, that's not what we're saying  
13 here in this particular situation. We're saying that he did  
14 everything proper. And so as such, Officer Garrett is not a  
15 proper defendant, the City of Broken Arrow would, of course, be  
16 a proper defendant. But what I'm saying is because of the  
17 exemptions set forth in the Tort Claims Act as identified in  
18 the briefing process with regard to acting within reasonable  
19 standards, law enforcement actions and activities, those types  
20 of things, is the City of Broken Arrow would be exempt even  
21 under the state tort law type claims for the three issues that  
22 they've raised.

23           THE COURT: Okay. So your primary defense then under  
24 state law is the tort act, Governmental Tort Claims Act  
25 exemption.

1 MS. WILKENING: It is, but also, I mean, if you go  
2 back and, I think, look at that Presbyterian vs. Thompson case  
3 it talks a little bit about retention and supervision and I  
4 think that if memory serves, the court actually -- and if  
5 you'll give me just a second I can find it -- but it talks  
6 about how the city or the -- and I use the city and the police  
7 department interchangeably, but the city has to be on notice  
8 that there's actually a problem in order for liability, even  
9 under a tort concept, to attach.

10 It's right here, Your Honor. In order to survive  
11 summary judgment on a claim for a negligent supervision and  
12 retention, plaintiff must show a genuine issue of material fact  
13 exists as to whether the officer engaged in a wrongful act that  
14 injured someone and that the defendant town was negligent in  
15 supervising or retaining the officer. And that was Rollins --

16 THE COURT: What page of Presbyterian is that on?

17 MS. WILKENING: I'm sorry?

18 THE COURT: You say -- are you reading that from  
19 Presbyterian?

20 MS. WILKENING: No, sir, that's Rollins vs. Town of  
21 Haskell.

22 THE COURT: Rollins.

23 MS. WILKENING: And it's on page 9 of my reply brief,  
24 Your Honor. And the Presbyterian case, it's the Presbyterian  
25 Church, it talks about negligent retention based upon an

1 employee's harm to a third party through employment.

2 THE COURT: Right.

3 MS. WILKENING: And goes on to say, you know, they  
4 have to be on notice.

5 THE COURT: Well, you're not going to be, as you say,  
6 you're not going to be liable for negligent retention unless  
7 you are on notice of some problem.

8 MS. WILKENING: Yes, sir.

9 THE COURT: Okay. Anything else?

10 MS. WILKENING: No, sir.

11 THE COURT: Thank you.

12 MS. WILKENING: Thank you.

13 THE COURT: Mr. Miles.

14 MR. MILES: Yes, Your Honor, thank you.

15 Your Honor, I believe in our brief we did set forth  
16 specific factual issues regarding the lack of training or  
17 improper training that Officer Garrett had in responding to  
18 this situation. I believe it was Sergeant Martin, who was  
19 responsible for the training of Officer Garrett with regard to  
20 the use of deadly force, testified that Garrett was trained to  
21 shoot at 10 yards if he was confronted with a edged weapon, or  
22 30 feet. That's what he said. He also -- and I believe it was  
23 Captain Arning who testified that there was no requirement to  
24 warn Samuel that he would be shot or killed, and Arning as well  
25 was responsible for the training of Officer Garrett.

1           There is a substantial amount of time spent by Roger  
2     Clark, an expert that was retained on behalf the plaintiff,  
3     that talked about, who talked about how to respond to a  
4     domestic violence call like this and that it was a two-person,  
5     two-officer call. And in fact, Officer Garrett was the backing  
6     officer on this call, Officer Hunsberger was the officer that  
7     initially received the call and Garrett just arrived there  
8     sooner than him.

9           One of the other issues with regard to the liability  
10    of the City is the fact that they lacked any, any policy on the  
11    use of medications by an officer on duty. And this really  
12    wasn't addressed the in the prior argument with regard to  
13    Officer Garrett, but the plaintiff alleges that Officer Garrett  
14    was taking a prescribed medication at the time of this shooting  
15    which affected his judgment. And in the materials that's set  
16    forth, there's testimony from his treating physician who  
17    described the medication, its effects and when it was  
18    prescribed by Officer Garrett.

19           THE COURT: All right, in that regard, first of all,  
20    certainly your expert witness can't testify as to the law, that  
21    it's a violation of constitutional rights not to have a policy  
22    with regard to use of medications. But I guess, number one,  
23    any evidence of problems in the City of Broken Arrow with that;  
24    and number two, any caselaw for the proposition that it's a  
25    violation, a constitutional violation not to have a policy



1 specifically addressing the use of medications by police  
2 officers?

3 MR. MILES: I've not been able to find any specific  
4 caselaw, Your Honor. With regard to problems within their  
5 particular department, we've not been able to develop any  
6 evidence of that, but to the extent that that's an issue, also,  
7 that you have to look at in the totality of the circumstances  
8 and in viewing the constitutionality of the action taken by  
9 Officer Garrett, you have to look at it from a reasonable  
10 officer's perspective and is it reasonable for an officer to be  
11 using a medication that could affect his judgment using a  
12 dangerous weapon under those circumstances? And we allege that  
13 the lack of policy in that regard is -- imposes liability on  
14 the part of the City.

15 I would like to address, also, the one case that Ms.  
16 Wilkening mentioned, Thompson vs. Salt Lake City which she  
17 indicated that a warning is not required for the use of deadly  
18 force. And I submit that is not what the case said. That case  
19 involved a factual situation where a police officer had let a  
20 police dog loose on an individual and subsequently the  
21 individual was shot. And it's at page 29 of the opinion. The  
22 Court said a warning is not invariably required even before the  
23 use of deadly force, let alone here where the release of a dog  
24 nondeadly force used in the face of an imminent threat. And it  
25 goes on to cite the Garner case where the Garner case said that

1 a warning was required where feasible. We submit in this case,  
2 Your Honor, certainly Officer Garrett had sufficient time to  
3 issue a warning from the time Samuel stepped out through the  
4 threshold of the door, when he stopped, when he took two more,  
5 two steps and stopped, he could have been warned the at that  
6 time; when he took another step and stopped, he could have been  
7 warned at that time. So I don't believe that the Thompson case  
8 does away with the requirement of providing a warning.

9 With regard to the Governmental Tort Claim that we  
10 submitted, we believe, Your Honor, that we have alleged that  
11 Officer Garrett, in the petition was negligent, and as a result  
12 of that the City is responsible under the theory of respondeat  
13 superior. I don't believe that there is an exemption for the  
14 City under those circumstances. And there is also a state case  
15 that addresses that issue and it's Morales vs. City Oklahoma  
16 City 210, OK 9, 230 P.3d 869.

17 THE COURT: That citation doesn't make sense. 210 --  
18 oh, 210 P.3d.

19 MR. MILES: No, 210 Oklahoma 9. That's the Oklahoma  
20 citation. The West cite is --

21 THE COURT: That doesn't make any sense. Maybe 2010?

22 MR. MILES: 2010, yes sir. What did I say?

23 THE COURT: You said 210.

24 MR. MILES: I'm sorry. Excuse me, Your Honor.

25 THE COURT: Okay. 2010 Oklahoma 9. And what's the

1 Pacific Reporter cite?

2 MR. MILES: 230 P.3d 869.

3 THE COURT: Okay. And what does Morales say?

4 MR. MILES: Under that case, Your Honor, the court  
5 discussed a situation where there was a tort claim filed as a  
6 result of an arrest and the court found in that case that the  
7 Governmental Tort Claim, the exemption did not apply because  
8 the plaintiff in that case, their claim was for the negligent  
9 performance of the function of carrying out an arrest, as  
10 opposed to a providing protective services. And I think the  
11 exemption that was discussed there, and I think this is the  
12 same exemption that the City of Broken Arrow cites at Section  
13 155, paragraph 6. Under those circumstances the Governmental  
14 Tort Claim exemption would not apply in our case.

15 THE COURT: Okay. But does that go to application of  
16 the exemption or the respondeat superior liability?

17 MR. MILES: That would be the application of the  
18 exemption and....

19 THE COURT: Okay. Everybody agrees here, you agree,  
20 she agrees that the officer was acting within the scope of his  
21 duties; correct?

22 MR. MILES: I believe that's correct, Your Honor.

23 THE COURT: All right. So as I understand it, Ms.  
24 Wilkening is arguing as a defense to the state tort claims  
25 Governmental Tort Claims Act exemptions exclusively; correct?

1           MR. MILES: That's what I understand. And as I  
2 understood there was a specific reference to paragraph 6 of the  
3 act.

4           THE COURT: Of 155 sub 6?

5           MR. MILES: Yes, sir.

6           THE COURT: All right, so that's what we need to deal  
7 with. All right, and you say Morales goes to that, in your  
8 opinion?

9           MR. MILES: Yes, sir.

10          THE COURT: All right, any other cases?

11          MR. MILES: That's all, Your Honor.

12          THE COURT: Okay. Thank you. Ms. Wilkening.

13          MS. WILKENING: If the Court please, I guess I  
14 misspoke previously.

15          THE COURT: No, you may not have. Are you talking  
16 about the Governmental Tort Claims Act, the respondeat  
17 superior?

18          MS. WILKENING: Yes.

19          THE COURT: Yes, I was going to say, if I've  
20 misrepresented your position, let me know.

21          MS. WILKENING: Well, the only thing that I would say  
22 with regard to that is I'm really not arguing the exemption  
23 solely. That wasn't my intent.

24          THE COURT: All right. So other than the exemptions,  
25 what else are you arguing?

1 MS. WILKENING: If you go back to very basic tort law  
2 and you look at, you know, duty, breach the duty, you know,  
3 meeting the elements, that's why I broke my brief down the way  
4 it did. The exemptions, I don't want to say that they're an  
5 afterthought, but if you go back and you take a look at the  
6 caselaw that I have cited in there with regard -- well, let me  
7 back up just a little bit, if I could. Okay. If you go back  
8 and look at the plaintiff's petition in its purest form. Okay.  
9 You know, what they are alleging is negligent supervision,  
10 retention and training. It's my position that through my brief  
11 on the exemptions notwithstanding, that I have demonstrated  
12 their failure to make a claim.

13 THE COURT: Under respondeat superior.

14 MS. WILKENING: Well, or under just pure tort law. I  
15 don't think that they can demonstrate meet the elements under  
16 pure tort law with regard to those elements, because if you  
17 look at the caselaw, I mean, it's pretty clear in there that  
18 the courts have said in this regard, in order to have an  
19 actionable claim under a negligence standard you have to  
20 demonstrate, you know, essentially that the city had to be on  
21 notice that there was some sort of problem. It's sort of like  
22 a pothole. As the Court well knows, a city can't be held  
23 responsible for a pothole unless it's been placed on notice  
24 that there's an issue. So it's not just the exemptions that  
25 are important here.

1           THE COURT: Got it. It's like a slip and fall case,  
2 the invitor has got to have notice, typically, of the  
3 condition.

4           MS. WILKENING: Right. Especially with regard to the  
5 supervision and retention.

6           THE COURT: And I didn't realize that was one of your  
7 arguments.

8           MS. WILKENING: Yes.

9           THE COURT: All right.

10          MS. WILKENING: Well, apparently I didn't put that out  
11 very well, but that was certainly my intent. And then, of  
12 course, with regard to the training issue, it's out position  
13 that they haven't offered any evidence which would assist them  
14 in overcoming the City's motion for summary judgment because of  
15 the all of the materials and the affidavits and the things like  
16 that that were set forth and touched in the City's motion.

17          Very briefly, he does talk a little bit about 10-foot  
18 rule. I think that he's -- or the 10 foot, the allegation it  
19 would be appropriate shoot someone if they were 10 feet away.  
20 That actually came out in the deposition, Sergeant Glenn  
21 Langley, who was the range master. And I think that what he  
22 said throughout his testimony -- I actually brought this up in  
23 the reply brief -- is that it's the totality of the  
24 circumstances that are important, not just the distance. And  
25 so that lends credibility to the fact that the City's training

1 programs, policies, procedures, that type of thing actually  
2 were in compliance with the law of the Tenth Circuit.

3 Let's talk very, very briefly with regard to this  
4 whole drug and alcohol policy. I mean the City does have a  
5 policy. Our employees, you know, may not have every single one  
6 of those policies, you know, committed, and depending on the  
7 way the question was asked, but the City does have a policy  
8 preventing its employees from showing up to work in a state of  
9 intoxication or being under the influence, and I believe that  
10 that was provide throughout the briefing process. And so it  
11 was obvious, and again this is set forth in the affidavits in  
12 response to -- in reply to his response to our brief that if  
13 the police officers have suspected that Officer Garrett was  
14 under the influence of something they would have had an  
15 obligation to document that, they would have had an obligation  
16 to have him tested. But if you look at the Oklahoma Workplace  
17 Drug Testing Act -- and there's been some changes in the law  
18 since this actually transpired -- but the City of Broken Arrow,  
19 the Police Department would have no reason to and actually  
20 couldn't say, okay, you need to go be drug tested in this  
21 particular situation absent some observation and documentation  
22 that he was under the influence. So...

23 And Mr. Wood asked me to bring to your attention,  
24 because you asked about the Estate of Larsen case with regard  
25 to the 21-foot rule. There's note in one of the footnotes that

1 Denver's use of force policy training manual instructs that  
2 knife welding persons within 21 feet pose an imminent threat to  
3 officers based on the time in which a distance can be closed in  
4 an attack. And so the 21-foot rule was discussed by the court,  
5 albeit in a footnote.

6 THE COURT: Right.

7 MS. WILKENING: With regard to Morales vs. City of  
8 Oklahoma City, I think that you will find, the Court will find  
9 that if you go into any exhaustive review of Oklahoma Supreme  
10 Court cases addressing the various exemptions, sometimes it's  
11 difficult to predict what the court will do in any given set of  
12 circumstances, but it is, of course, our position in this that  
13 the plaintiff has not met the initial burden of being able to  
14 meet all of the elements in these three causes of action, and  
15 additionally that the exemptions would apply. Thank you.

16 THE COURT: Thank you very much. If there's nothing  
17 further we are adjourned.

18 (Court adjourned.)

19

20 A TRUE AND CORRECT TRANSCRIPT.

21

22 CERTIFIED: s/ Glen R. Dorrough  
23 Glen R. Dorrough  
24 United States Court Reporter (retired)

25